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No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v.

HYDROLEVEL CORPORATION,

Respondent.

AMICUS CURIAE BRIEF OF THE AMERICAN METEOROLOGICAL SOCIETY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTEREST OF AMICUS CURIAE

The American Meteorological Society (AMS) is a non-profit tax-exempt scientific and educational organization founded in 1919.[1] Its worldwide membership now totals 9758. The stated goals of the Society are the advancement of the atmospheric and hydrospheric sciences and professional ideals.[2]

[1] AMS is exempt from taxation as a non-profit scientific and educational corporation under the terms of Section 501(c) (3) of the Internal Revenue Code.

[2] Consent to the filing of this brief has been obtained from counsel for the American Society of Mechanical Engineers and

In furtherance of those purposes the AMS publishes six scientific and educational journals and through the efforts of its council maintains sixty-five boards, committees and commissions. These groups review new scientific advances, issue policy statements, set standards and conduct certification programs. Virtually all of this work is done by over three-hundred-seventy volunteer scientists and meteorologists at locations widely scattered from the Society's headquarters in Boston, Massachusetts.

One of these programs is the Board of Certified Consulting Meteorologists (CCM). Through its testing procedures the Board evaluates the competence and experience of professional meteorologists. Since no state or federal agency regulates in the field or licenses meteorologists, CCM designation has become an important standard in the industry.

All of these activities are of vital importance to the public. The profession has gone far beyond simple daily news program weather forecasts. Meteorologists are employed by government and industry to conduct environmental studies, provide specialized forecasts for agriculture, aviation and marine operations, assist in planning the location of new facilities, give warning of weather conditions and floods which threaten life or property among many other services.

The AMS interest in this case arises from its deep involvement in the self-regulation of the profession in the absence of any effort by government to do so. In performing this service the Society must rely on volunteer scientists and other professionals who in many instances are business competitors. The extent to which the AMS as a whole may be liable for any illegal and unauthorized

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Hydrolevel Corporation as is more fully evidenced by letters dated May 15, 1981 and May 19, 1981 signed by respective counsel and on file with the Clerk of this Court.

conduct of its members will have considerable impact on its ability to continue to engage in these activities.

ARGUMENT

THE SECOND CIRCUIT DECISION IN THIS CASE PLACES AN IMPOSSIBLE BURDEN ON PROFESSIONAL AND SCIENTIFIC ORGANIZATIONS WHICH THREATENS TO CURTAIL OR DESTROY EFFORTS AT SELF-REGULATION IN THE PUBLIC INTEREST.

The importance of the role of voluntary associations in the protection of the public is beyond question. Certainly, no government agency could hope to bring together all of the knowledge, talent and resources marshalled by these organizations. The necessity of using unpaid volunteers to fulfill this need was not questioned even by the Panel in this case. 635 F.2d at 126. The decision, however, fails to adequately consider the practical consequences which flow from this necessity. As is true of the AMS, volunteer services are performed at widely scattered locations far from the small administrative staffs maintained by the organization. The very essence of volunteer effort, particularly on the professional level, requires an independence of thought and action which defies supervision of the type used in commercial affairs. The opinion below held a scientific society liable for the acts of a volunteer even though such acts were unauthorized, were done without the knowledge of the Society, were not for its benefit and would have been impossible to prevent. The imposition of such a standard of strict liability in this setting is inappropriate and contrary to public policy.

This Court has recognized that the practices of professional organizations, while not exempt from antitrust enforcement, should be evaluated in a manner consistent with their public service role. *Goldfarb v. Virginia State Bar Association,* 421 U.S. 773, 788 n. 17. No case could present a more compelling opportunity for the application of this principle than the one now before this Court. The

Second Circuit decision will have a chilling effect on the ability of the AMS and other organizations to regulate their professions in the public interest. Moreover, it is difficult to see how the adoption of a more realistic standard of liability would endanger the policy of vigorous antitrust enforcement both public and private. The Plaintiff in this case sought and obtained redress from the individuals responsible for its injury and from their employers who were the only beneficiaries of their abuse of ASME's procedures. Such will always be the case where individuals make illegal and unauthorized use of their professional organizations to strike at business competitors. Thus, it is clear that a balancing of these two important policy considerations weighs heavily in favor of a different standard than that announced by the Second Circuit.

Even assuming that this Court were to agree with the doctrine established by the decision below, there are important reasons why this case should still be heard. In holding ASME liable for the conduct of its volunteer (Hardin) it suggested that the Society could have exculpated itself by exercising some further degree of supervision over his conduct:

> ". . . When an organization has placed a person in a position to do what Hardin did, *without any check or supervision,* it must bear the consequences. 635 F.2d at 126. (emphasis supplied)

Yet the uncontroverted facts show that Hardin's draft of the offending letter was sent to the chairman and vice-chairman of the full committee for their review. In failing to further define what, if any, level of supervision would be necessary the Panel left a great and important void in the center of so important a decision. Many scientific societies are now attempting to adjust their policies and procedures to meet the demands of rapidly changing interpretations of the antitrust laws. The AMS is

among such organizations. The lack of clarity in the Panel's decision on this issue will cause even those making good faith efforts to comply with the law to consider withdrawal from the field rather than risk the severe sanctions which will be imposed if an antitrust violation is found. Given the importance of these activities to the public interest, this Court should offer additional guidance.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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